96-8653 (2)

NO. ___

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

KEVIN D. GRAY,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ORIGINAL

PETITION FOR WRIT OF CERTIORARI

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54 pp (9)

QUESTION PRESENTED

DID THE INTRODUCTION OF A REDACTED STATEMENT OF A NONTESTIFYING CODEFENDANT DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION ?

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

KEVIN D . GRAY,

Petitioner

v.

STATE OF MARYLAND,

Respondent

PETITION FOR WRIT OF CERTIORARI

Kevin D. Gray, Petitioner, by his attorneys, George E. Burns and Arthur A.DeLano, Jr., Assistant Public Defenders, Office of the Public Defender for the State of Maryland, requests that a writ of certiorari be issued to review the judgment of the Court of Appeals of Maryland entered on January 15, 1997 in State of Maryland v. Kevin D. Gray, No. 15, September Term, 1996.

OPINION BELOW

The opinion of the Court of Appeals of Maryland, which is reported and published, is reproduced at page one of the Appendix to this Petition. The opinion of the Court of Special Appeals of Maryland, which is reported and published, is reproduced at page twenty-four of the Appendix to this Petition.

JURISDICTION

The Court of Appeals of Maryland affirmed the judgment of the Circuit Court for Baltimore City, convicting Petitioner of involuntary manslaughter. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

STATEMENT OF THE CASE

Petitioner was convicted in the Circuit Court for Baltimore City of involuntary manslaughter and was sentenced to ten years imprisonment with all but seven years suspended. His conviction and sentence were reversed by the Court of Special Appeals of Maryland on December 4, 1995. Gray v. Maryland, 107 Md. App. 311, 667 A.2d 983 (1995). On April 17, 1996, the Court of Appeals of Maryland granted a petition for a writ of certiorari. On January 15, 1997, the Court of Appeals of Maryland reversed the judgment of the Court of Special Appeals of Maryland and affirmed the judgment of the Circuit Court for Baltimore City. Maryland v. Gray , 344 Md. 417, 687 A.d 660 (1997).

Petitioner and Anthony Bell were originally charged with murder. The State contended that StaceyWilliams died as a result of a beating by Petitioner, Anthony Bell, Jacquin Vanlandingham (hereinafter Tank), and several other boys.[1] Bell gave

---

[1] The jury was told that Tank was fatally shot two days after this incident.

a written statement to the police in which he incriminated himself, Petitioner, and Tank. Petitioner gave an exculpatory oral statement to the police.[2]

Prior to trial, Petitioner moved to sever his case from Bell's on the grounds that Bell's statement incriminated him. The trial judge denied the motion to sever on the grounds that Bell's statement could "be sanitized in about three different spots so as to remove the names of Tank and Mr. Gray and the jury will not be left with the unavoidable inference or implication that the person Mr. Bell is referring to in the st ment is Mr. Gray." At trial, Bell's redacted statement was introduced into evidence[3]:

> Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?
>
> Answer, an argument broke out between deletion and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran into Wildwood Parkway. Me, deleted, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.
>
> Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?
>
> Answer, hit, kicked.
>
> Question, who hit and kicked Stacey?
>
> Answer, I hit Stacey. He was kicked, but I don't know who kicked him.
>
> Question, who was in the group that beat Stacey?
>
> Answer, me, deleted, deleted, and a few other guys.
>
> Question, do you know the other guy's name?
>
> Answer, deleted, deleted, and me. I don't remember who was out there.
>
> Question, did anyone pick Stacey up and drop him to the ground?
>
> Answer, no, when I was there.
>
> Question, what was the argument over between Stacey and deleted?
>
> Answer, some money that Stacey owed deleted.
>
> Question, how many guys were hitting on Stacey?
>
> Answer, about six guys.
>
> Question, do you have a black jacket with Park Heights written on the back?
>
> Answer, yes.
>
> Question, who else has these jackets?
>
> Answer, deletion.
>
> Question, after reading this statement, would you sign it?
>
> Answer, yes. He then signed it.

---

[2] In his statement, Petitioner denied beating Williams. Petitioner told the police that he was on the phone nearby when Williams was beaten.

[3] The trial judge granted Petitioner a continuing objection to Bell's statement. Before Bell's statement was introduced into evidence, the trial judge instructed the jury as follows:

> THE COURT: Thank you, Mr. Amaral. Ladies and gentlemen of the jury, you're about to hear evidence concerning the statement provided by Mr. Bell when he was interviewed by the detective. You should understand, and I will remind you later, that this evidence concerning the statement provided by Mr. Bell is to be considered by you as evidence against Mr. Bell only and in no way is Mr. Bell's statement provided to the detective about which he's about to testify to be considered by you as evidence against Mr. Gray. It is evidence against Mr. Bell only, and as I will instruct you later, you will consider the evidence against each of the defendants individually and reach a separate verdict as to each defendant. You may proceed, Ms. Saxon.

Two additional witnesses testified at trial. The first testified that she saw Stacey Williams being chased down the street by Tank, Petitioner, and several other guys. Williams looked scared. The witness did not see who assaulted Williams. The second witness testified that he saw Williams being beaten. The witness was sitting on his steps across the street when Tank, Bell, Petitioner and three other guys confronted Williams. Tank banged Williams in the mouth. Tank kicked Williams several times. Tank then picked Williams up and "DDT'd him" three times.[4] According to this witness, Petitioner tried to, but couldn't, pick Williams up over his head. The witness described Bell as the leader of the group.

Petitioner testified that he did not participate in the beating of Williams. Petitioner maintained that he was talking on the phone with his girlfriend at the time of the beating. Petitioner called several other witnesses to support his claim that he was not involved in the beating.

In reversing Petitioner's conviction, the Court of Special Appeals found that under the circumstances of this case "the introduction of a nontestifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using the words "deleted" and "deletion", and the

[4] DDT is apparently a World Wrestling Federation term for picking someone up off the ground and then dropping them head first to the mat.(Tc.120-Tc.122, Tc.189)

reading of that statement before a jury, violates a defendant's rights under the Confrontation Clause of the Sixth Amendment, even if the jury is instucted to consider the statement only against the codefendant-confessor." (App. 27) The Court of Special Appeals reasoned that, in the context of the other evidence at trial, the mere deletion of Petitioner's and Tank's names did not effectively make Bell's statement nonincriminating as to Petitioner. (App. 41) There existed, in other words, a "substantial risk" that the jury considered Bell's statement in deciding Petitioner's guilt. (App. 41)

In affirming Petitioner's conviction, the Court of Appeals held that the introduction of a nontestifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using the words "deleted" and "deletion", and the reading of that statement before a jury, does not violate a defendant's rights under the Confrontation Clause of the Sixth Amendment, if the jury is instructed to consider the statement only against the codefendant-confessor and the statement does not "compel" a directly inculpating inference between the redacted confession and the nonconfessing codefendant. (App. 19) The Court of Appeals then went on to explain that "the compulsion to make the impermissible inference must be compelling, inevitable, and subject to little or no debate." (App. 16)

REASONS FOR ISSUING THE WRIT

THE INTRODUCTION OF A REDACTED STATEMENT OF A NONTESTIFYING CODEFENDANT DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT

This case presents for resolution the question left unanswered in Richardson v. Marsh, 481 U.S. 200, 211 n.5, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987): whether the introduction of a nontestifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using " a symbol or neutral pronoun", violates a defendant's rights under the Confrontation Clause of the Sixth Amendment, even if the jury is instructed to consider the statement only against the codefendant-confessor.[5] As the Court of Appeals of Maryland

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[5]In Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), this Court held that a defendant is deprived of his Sixth Amendment right of confrontation when an incriminating confession of a nontestifying codefendant which names the defendant as an accomplice is introduced at their joint trial. The Court went on to hold that, given the "substantial risk" that the jury would consider a nontestifying co-defendant's incriminating confession against the defendant, a new trial is required even where the court specifically instructs the jury that the codefendant's confession must be considered as evidence only against the codefendant. Id. at 391 U.S. 126-137. In Richardson, this Court held that "the Confrontation Clause is not violated by the admission of a nontestifying defendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." 481 U.S. at 211. (emphasis added)

observed below, "there exists a substantial split of authority on the proper approach to the question expressly left open in Marsh." (App. 12)

A number of jurisdictions have adopted the "facial implication" doctrine for assessing whether or not a nontestifying codefendant's redacted confession may be introduced at a joint trial. Under this doctrine, the redacted confession must "be viewed in isolation from the other evidence introduced at trial." United States v. Williams, 936 F.2d 698, 700 (2d Cir. 1991) If "the confession, when so viewed, does not incriminate the defendant, then it may be admitted with a proper limiting instruction, even though the other evidence in the case indicates that the neutral pronoun is in fact a reference to the defendant." Id. See, e.g., United States v. Hoac, 990 F.2d 1099, 1105 (9th Cir. 1993); United States v. Strickland, 935 F.2d 822, 825-26 (7th Cir. 1991); United States v. Donohue, 948 F.2d 438, 444 (8th Cir. 1991); United States v. Vogt, 910 F.2d 1184, 1192 (4th Cir. 1990); United States v. Espinoza-Seanez, 862 F.2d 526, 535 (5th Cir. 1988); United States v. Gonzales, 749 F.2d 1329, 1334 (9th Cir. 1984); United States v. Belle, 593 F.2d 487, 493 (3d Cir. 1979); Hodges v. Rose, 570 F.2d 643, 646-47 (6th Cir. 1978); United States v. Dady, 536 F.2d 675, 677-78 (6th Cir. 1976); Harris v. State, 218 Ga. App. 472, 473, 462 S.E.2d 425, 427 (1995); State v. Craney, 662 A.2d 899, 903 (Me. 1995); Commonwealth v. Sanford, 323 Pa. Super 436, 439-40, 470 A.2d 998, 999-1000 (1984).

Other jurisdictions have adopted an "evidentiary linkage" approach for assessing whether or not a nontestifying codefendant's redacted confession may be introduced at a joint trial. Under the "evidentiary linkage" approach, a nontestifying codefendant's redacted confession may not be admitted at a joint trial where, in the context of the other evidence admitted at trial, there is a "substantial risk" that the jury will consider the codefendant's redacted statement in deciding the guilt of the defendant. See, e.g., United States v. Van Hemelryck, 945 F.2d 1493, 1502-03 (11th Cir. 1991); United States v. Pendegraph, 791 F.2d 1462, 1465-66 (11th Cir. 1986); People v. Fletcher, 13 Cal. 4th 451, 456, 917 P.2d 187, 189 (1996); Smith v. United States, 561 A.2d 468, 474 (D.C. 1989); People v. Cruz, 121 Ill.2d 321, 330-31, 521 N.E.2d 18, 22-23 (1988); People v. Kahn, 200 A.D. 129, 136-37, 613 N.Y.S.2d 198, 203-04 (1994); State v. Johnson, 71 N.C. App. 90, 92, 321 S.E.2d 510, 513 (1984).

Petitioner submits that a nontestifying codefendant's redacted confession must be viewed in context. A redacted confession of a nontestifying codefendant cannot be viewed in isolation. A redacted confession of a nontestifying codefendant should not be admitted at a joint trial where, in the context of the other evidence admitted at trial, there is a "substantial risk" that the jury will consider the codefendant's redacted statement in deciding the guilt of the defendant.[6] As the D.C.

[6] The "compelling inference" standard adopted by the majority of the Court of Appeals of Maryland is not in accord "with the rationale of Bruton as explained and limited by Marsh." The Court of Appeals' reliance on the effectiveness of

Court of Appeals explained in Smith v. United States, 561 A.2d 468, 473-74 (D.C. App. 1989):

> In Foster v. United States, 548 A.2d 1370 (D.C. 1988), this court considered the question the Supreme Court explicitly left open in Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987): the constitutionality under the sixth amendment of admitting at a joint trial, with a proper limiting instruction, a confession of a nontestifying codefendant "in which the defendant's name has been replaced with a symbol or neutral pronoun," id. at 211 n.5, 107 S.Ct. at 1709 n.5. We held that "a properly and effectively redacted statement substituting neutral references for names (including nicknames and the like) and/or descriptions ... may be admitted into evidence at a joint trial (when coupled with proper limiting instructions) unless a `substantial risk' exists that the jury will consider that statement in deciding the guilt of the defendant." Foster, 548 A.2d at 1378. In order to determine whether a substantial risk exists, "the trial court must consider the degree of inference the jury must make to connect the defendant to the statement and the degree of risk that the jury will make the linkage despite a limiting instruction." Id. at 1379. The trial court's assessment as to whether the redaction effectively avoids linkage with the defendant must be made in the context of other evidence admitted at trial. Id.
>
> * * *
>
> ... In the present case, we conclude that the trial court's admission of Harris' written confession with whited-out blank spaces in lieu of Smith's name violated Smith's sixth amendment rights. The fourteen black rectangular squares scattered throughout Harris' two-page confession clearly showed that another person was present and actively assisting Harris. We believe that this confession, viewed in light of the other testimony adduced at trial, see Foster, 548 A.2d at

limiting instructions is clearly misplaced. Where, as here, the Court of Appeals of Maryland expressly found the jury "could have reasonably inferred that one of the deleted names belonged to [Petitioner]", then a limiting instruction is insufficient under Bruton.

> 1379, virtually invited the jury to use Smith's name to "fill in the blanks." Accordingly, we conclude there was a "substantial risk" that the jury relied on this confession in deciding Smith's guilt as well.

On this record, the jury could not help but infer that the deletions in Bell's redacted statement were Petitioner and Tank.Only three of William's assailants were ever identified at trial---Bell, Petitioner, and Tank. As the Court of Special Appeals of Maryland observed below:

> Mere deletion of appellant's (and Tank's) name did not effectively make Bell's statement nonincriminating as to appellant. In the context of other evidence (Brumfield's and Yarberough's testimony), the jury need only have taken a short step in inferring that appellant was one of those involved. Stated otherwise, it did not have to make a substantial inference that appellant was the person neutrally referenced in the redacted statement. Therefore, there existed a "substantial risk" that the jury considered the statement in deciding appellant's guilt. Indeed, with Tank dead, the jury was "virtually invited ... to use [appellant]'s name to 'fill in the blanks.' " Id. Simply stated, the use of "deleted" or "deletion" was insufficient to protect appellant against "the practical and human limitations of the jury system." Bruton, 391 U.S. at 135, 88 S.Ct. at 1627. See also Greenwell v. United States, 336 F.2d 962, 969 (D.C.Cir.1964) (replacing name of defendant with neutral term such as "named person" insufficient redaction since "with other evidence ... connecting the co-defendants in the commission of the crime, it is difficult to believe that the jury was unable to divine who the 'anonymous nobody' referred to in the confession was"). Although, as the State argues, there were six perpetrators, any one of which the jury could infer was referred to by the deletions, only three were positively identified--Bell, appellant, and Tank. Appellant's role was clearly demonstrated by Bell's statement, rendering it facially incriminating and constitutionally violative. "To hold that there was not a substantial risk that the[jury] would consider th[e] evidence ... in considering [a codefendant]'s guilt (limiting instruction or not) would require us to wink at the reality of human behavior of jurors as recognized by the Court in both Bruton and Richardson v. Marsh." Foster v. United States, 548 A.2d 1370, 1379 (D.C.App.1988).

Thus, the instant case represents a point on the continuum between Bruton and Richardson "where one cannot have the requisite degree of assurance that the jury will not improperly *328 consider the evidence in deciding the guilt of the defendant against whom the evidence is not admissible despite a proper limiting instruction." Foster, 548 A.2d at 1378. We add further that we distinguish Richardson v. Marsh by the manner of redaction employed. In Richardson, Marsh's role in the perpetration of the crime had been totally eliminated. There was no indication that anyone other than Williams and [667 A.2d 991] Martin committed the crime. In the instant case, however, appellant's role was disclosed, albeit with reference to a neutral person. Bell was not portrayed as solely having assaulted Williams and the jury could reasonably infer that it was appellant whose name had been "deleted." (E. 20)

The admission of Bell's statement violated the clear dictates of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). There was "a substantial risk" that the jury, despite the court's instructions to the contrary would look to Bell's redacted statement in determining Petitioner's guilt. Petitioner should either have been granted a severance or if tried jointly then Bell's statement should have been excluded.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

Stephen E. Harris
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APPENDIX

IN THE COURT OF APPEALS OF MARYLAND

No. 15

September Term, 1996

STATE OF MARYLAND

v.

KEVIN D. GRAY

Bell, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Raker
Murphy, Robert C.
(retired, specially assigned)

JJ.

Opinion by Karwacki, J.
Bell, C.J. & Eldridge, J., dissent

Filed: January 15, 1997

The issue presented in this case is whether the introduction of a nontestifying codefendant's confession implicating a defendant and others, which is redacted to exclude the names of all those involved in the crime, other than the confessor, by using the words "deleted" and "deletion," violates a defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution, even if the jury is instructed to consider the confession only against the codefendant-confessor? We shall hold that under the circumstances in this case it does not and reverse the judgment of the Court of Special Appeals.

I.

Stacey Williams was beaten on November 10, 1993, by a group of six young men. Within a few hours, Williams died from his injuries. Following a preliminary investigation, the police arrested Anthony Bell. In a written statement to police, Bell implicated himself, Jacquin Vanlandingham, and Kevin Domonic Gray, the Petitioner, as participants in the beating. Vanlandingham was fatally shot two days after

Williams' death,[7] and Gray was arrested one day later. These three individuals were the only ones identified by name in Bell's statement to police as those involved in the murder, although evidence adduced at trial suggested that as many as six persons participated in the attack on Williams.

Bell and Gray were scheduled to be tried jointly in the Circuit Court for Baltimore City. Prior to trial, however, Gray moved to sever his trial from Bell's, or alternatively to exclude his confession from evidence. The trial court denied both motions but ordered the redaction of Gray and Vanlandingham's names from Bell's confession.

At trial, the State presented the testimony of Tracy Brumfield, Shay Yarberough, and Baltimore City Homicide Detective Homer Pennington. Brumfield testified that she saw Gray, Vanlandingham, and several others chase Williams down the street. Yarberough, the only witness to Williams' beating, testified that he saw Vanlandingham lift Williams over his head and drop him on the sidewalk. Yarberough also testified that Gray attempted the same maneuver, albeit less successfully, and, along with the other five members of the group, including Bell, repeatedly kicked Williams about the ribs, neck, and head.

Detective Pennington testified that his investigation led him to arrest and interview Bell. In the course of that

[7] We do not mean, nor is there any evidence in the record, to suggest that Vanlandingham and Williams' murders are related.

interview, Bell formally confessed to participating in the beating of Williams, implicating both Gray and Vanlandingham in the process.

The State was permitted to read Bell's confession into evidence over his objection, but, as indicated, *supra*, was concomitantly required to redact the names of Gray and Vanlandingham, and insert in their place, the words "deletion" or "deleted." A copy of the redacted confession was admitted into evidence with blank white spaces indicating where the names of Gray and Vanlandingham had been.

Unlike Bell, Gray testified in his own defense, claiming that he was speaking with his girlfriend on a public telephone when the fray ensued. Chanel Brown, Gray's girlfriend, testified that he had called her from a telephone booth and, during that conversation, said that Vanlandingham was fighting. Defense witness Lamont Mathews testified that although he had witnessed Williams' beating, he placed Gray at a telephone booth "up the street" during the melee. The jury nonetheless convicted Gray of involuntary manslaughter, for which he was sentenced to ten years imprisonment with all but seven years suspended.

Gray appealed that judgment to the Court of Special Appeals, claiming that the introduction of Bell's redacted confession violated his Sixth Amendment right to confrontation, and was contrary to the holding in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476

(1968). The intermediate appellate court agreed and reversed Gray's conviction. *Gray v. State*, 107 Md. App. 311, 667 A.2d 983 (1995). We granted the State's Petition for a Writ of Certiorari.

II.

In the trial of every criminal case, state or federal, a defendant has the right "to be confronted with witnesses against him." U.S. Const. amend. VI; *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923, 926 (1965)(Sixth Amendment made applicable to states through Fourteenth Amendment); *Smallwood v. State*, 320 Md. 300, 306, 577 A.2d 356, 359 (1990); *Harris v. State*, 306 Md. 344, 361, 509 A.2d 10, 128 (1986). Implicit in this principle is the right to cross-examine those witnesses. *Pointer*, 380 U.S. at 406-07, 88 S. Ct. at 1069-70, 13 L. Ed. 2d at 928; *Smallwood*, 320 Md. at 306, 577 A.2d at 359.

In *Bruton v. United States, supra*, the United States Supreme Court held that the admission of a nontestifying codefendant's pretrial confession implicating another codefendant by name, violated that defendant's Sixth Amendment confrontation right, notwithstanding an instruction to the jury to disregard the confession in determining the nonconfessing defendant's guilt.[8] Bruton was tried and

[8] The *"Bruton* Rule" was extended to state court proceedings in *Roberts v. Russell*, 392 U.S. 293, 88 S. Ct. 1921, 20 L. Ed.2d 1100 (1968).

convicted along with one Evans, who, during the preceding investigation, orally confessed to a postal inspector that he and Bruton perpetrated an armed postal robbery. The postal inspector subsequently testified to Evans' confession. The trial judge duly instructed the jury that the confession was competent evidence against Evans only and was not to be used in assessing Bruton's innocence or guilt.[9] The Supreme Court nevertheless reversed Bruton's conviction.

In so doing, the Court repudiated its previous position that "'it is reasonably possible for the jury to follow' sufficiently clear instructions to disregard the confessor's extrajudicial statement that his codefendant participated with him committing the crime." *Bruton*, 391 U.S. at 126, 88 S. Ct. at 1622, 20 L. Ed. 2d at 479 (quoting *Delli Paoli v. United States*, 352 U.S. 232, 239, 77 S. Ct. 294, 299, 1 L. Ed. 2d 278, 284 (1957)). The reason for the departure, articulated initially by the *Delli Paoli* dissent, was that:

> "too often such admonition against misuse [of a codefendant's confession] is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collection of words and fails of its purpose as a legal protection to defendants . . . . The Government should

[9] The relevant portion of the judge's instruction advised the jurors that:

> "A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession. Therefore, if you find that a confession was in fact voluntary and intentionally made by the defendant Evans, you should consider it as evidence in the case against Evans, but you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton.

> not have the windfall of the jury being influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.

352 U.S. at 247-48, 77 S. Ct. at 302, 1 L. Ed. 2d at 288 (Frankfurter, J., dissenting).

The Court acknowledged three arguments supporting the use of limiting instructions in this area, namely the probative value of the confession, judicial economy, and the integrity of the jury system itself, but categorically rejected the first two. While the confession may be the best evidence of the confessor's guilt, alternative ways exist to allow the State the benefit of the confession without infringing upon the nonconfessing defendant's constitutional rights. *Bruton*, 391 U.S. at 133-34, 88 S. Ct. at 1626, 20 L. Ed. 2d at 483-84. The use of redactions is but one example. *Id.* at 134 n.10, 88 S. Ct. at 1627 n.10, 20 L. Ed. 2d at 484 n.10.

Similarly, joint trials conserve state resources by avoiding the necessity of duplicate proceedings, reduce inconveniences to witnesses, and accelerate the judicial process. *Id.* at 134, 88 S. Ct. at 1627, 20 L. Ed. 2d at 484. Nevertheless, fundamental constitutional rights, such as the right of confrontation, are seldom sacrificed upon the altar of judicial efficiency. *Id.* at 135, 88 S. Ct. at 1627, 20 L. Ed. 2d at 484.

Turning to the third argument in support of limiting instructions, the Court acknowledged that inadmissible evidence inevitably finds its way before the jury, but that reliance on the

jury's ability to perform its role is justified under many circumstances. *Id.*, 88 S. Ct. at 1627, 20 L. Ed. 2d at 484. In those instances, "[i]t is not unreasonable to conclude . . . [that] the jury can and will follow the trial judge's instructions to disregard such information. *Id.*, 88 S. Ct. at 1627, 20 L. Ed. 2d at 484-85. When, however,

> "the powerfully incriminating extrajudicial statements of a codefendant who stands side-by-side with the defendant, are deliberately spread before the jury in a joint trial . . . the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure [are] so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

Id. at 135-36, 88 S. Ct. at 1627, 20 L. Ed. 2d at 485. The Court concluded that:

> "despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating [Bruton], in the context of a joint trial, we cannot accept limiting instructions as an adequate substitute for [Bruton's] constitutional right of cross examination . . . . The effect is the same as if there had been no instruction at all."

Id. at 137, 88 S. Ct. at 1628, 20 L. Ed. 2d at 485-86.

III.

Nineteen years later in *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), the practice of omitting any references to a defendant from a statement being introduced against a confessing codefendant was challenged ▓ a practice initially suggested by the Court itself. *See*, Part II., *supra*. Clariss

Marsh, Benjamin Williams and Kareem Martin were charged with assaulting Cynthia Knighton and murdering her son, Koran, and her aunt, Ollie Scott. Over Marsh's objection, Marsh and Williams were tried together.[10] At trial, the state introduced a confession made by Williams shortly after his arrest. The confession had been redacted to omit all references to Marsh. In fact, on its face, the confession implicated no one other than Williams and Martin in the crimes. Williams did not testify. Nevertheless, Marsh was linked to the confession via her own testimony that she was in the vehicle on the way to the crime scene when, by Williams' admission, he and Martin discussed their plans to rob and kill the victims, although Marsh claims not to have heard the conversation. Marsh also testified to being in the house during the robbery, but could not explain why she did not attempt to flee or otherwise assist the victims.

During his closing remarks, the prosecutor cautioned the jury not to use Williams' confession as evidence against Marsh. Nevertheless, he linked Marsh to the confession by suggesting that if Marsh was in the car during Martin and Williams' conversation, she was, by implication, part of the criminal enterprise. Marsh was convicted of two counts of felony murder and one count of assault with intent to commit murder.

Marsh successfully appealed her conviction to the United States Court of Appeals for the Sixth Circuit. 781 F.2d 1201 (1986). In reversing her conviction, that court opined:

[10] Kareem Martin was a fugitive at the time of trial.

> "Sanctioning the admission of an extrajudicial statement in circumstances in which a substantial risk exists that the statement will be used against the defendant not only denies the Sixth Amendment Right to Confrontation, but raises serious due process concerns regarding the validity of the conviction and the fundamental fairness of the trial process. It is no answer to this unfairness to say that the evidence that set the stage was subject to cross-examination. . . . [T]he determination of whether there exists a substantial risk that the jury might have [improperly] considered [the confession] `may require consideration of other evidence.'"

781 F.2d at 1212 (citations omitted). Assuming the existence of such a risk, the Sixth Circuit noted that the only direct evidence[11] suggesting Marsh knew beforehand that the victims would be robbed and executed was Williams' account of his conversation with Martin just prior to the crime. *Id.* at 1210. In view of the lack of other evidence connecting Marsh to the activities of Williams and Martin, the prosecutor's linkage of Marsh to the confession proved "powerfully incriminating" to her with respect to the critical element of intent, *id.* at 1213, thereby violating her Sixth Amendment confrontation right. Noting that other courts of appeals have declined to adopt the "evidentiary linkage" or "contextual implication" approach to the *Bruton* problem, the United States Supreme Court granted certiorari to resolve the conflict. 476 U.S. 1168, 106 S. Ct. 2887, 90 L. Ed. 2d 976 (1986).

The Supreme Court in *Marsh* rejected the Sixth Circuit's

[11] We note that under Maryland law, there is no difference, in terms of evidentiary value, between direct evidence and circumstantial evidence. *See, e.g., Magnum v. State*, 342 Md. 392, 398, 676 A.2d 80, 82 (1995).

analysis and characterized the holding in *Bruton* as "a narrow exception" to the general principle that jurors follow instructions given them.[12] *Marsh*, 481 U.S. at 206-07, 107 S. Ct. at 1707, 95 L. Ed. 2d at 185. The Court premised its holding upon three basic assumptions. First, "where the necessity of . . . linkage [to other evidence] is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." 481 U.S. at 208, 107 S. Ct. at 1708, 95 L. Ed. 2d at 186. Unlike specific testimony directly inculpating the defendant, as was the case in *Bruton*, inferential incrimination can be avoided by dissuading the jury from making the inference in the first instance. *Id.*, 107 S. Ct. at 1708, 95 L. Ed. 2d at 186.

Second, the practical effect of the "linkage" or "contextual approach" to the *Bruton* question would place an impossible burden upon trial courts. If limited to *facially* incriminating confessions, *Bruton* compliance could be had by simple redaction. *Id.* at 208-09, 107 S. Ct. at 1708, 95 L. Ed. 2d at 186 (citing

[12] In support of this principle, the Court cited *Francis v. Franklin*, 471 U.S. 307, 324-25 n.9, 105 S. Ct. 1965, 1976 n.9, 85 L. Ed. 2d 344, 359-60 n.9 (1985)(Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them), *Harris v. New York*, 401 U.S. 222, 225-26, 91 S. Ct. 643, 645-46, 28 L. Ed. 2d 1,4-5 (1971)(provided jury is properly instructed, statements obtained in violation of *Miranda* can be used to impeach defendant's credibility, even though inadmissible to prove defendant's guilt), *Marshall v. Longberger*, 459 U.S. 422, 438-39 n.6, 103 S. Ct. 843, 853 n.6, 74 L. Ed. 2d 646, 661-62 n.6 (1983)(crucial assumption underlying the system of trial by jury is that jurors will follow the instructions given them by the trial judge), *Tennessee v. Street*, 471 U.S. 409, 415, 105 S. Ct. 2078, 2082, 85 L. Ed. 2d 425, 431 (1985)(codefendant's confession properly admitted to prove defendant's confession was not coerced), *Watkins v. Sowders*, 449 U.S. 341, 347, 101 S. Ct. 654, 658, 66 L. Ed. 2d 549, 555 (1981)(instruction admonishing jury not to consider improperly admitted eyewitness testimony sufficient to cure error), *Walder v. United States*, 347 U.S. 62, 65-66, 74 S. Ct. 354, 356, 98 L. Ed. 503, 507 (1954)(illegally obtained evidence properly admitted to impeach defendant with appropriate limiting instruction). *Richardson v. Marsh*, 481 U.S. 200, 206-07, 107 S. Ct. 1702, 1707, 95 L. Ed. 2d 176, 185 (1987).

Bruton, 391 U.S. at 134 n.10, 88 S. Ct. at 1627 n.10, 20 L. Ed. 2d at 484 n.10). Conversely, an analysis requiring linkage requires both a pretrial and post-trial determination of whether, after viewing all the evidence introduced, the confession is so "powerfully incriminating" that it should either be excluded in the first instance or the defendant granted a new trial. *Id.* at 209, 107 S. Ct. at 1708, 95 L. Ed. 2d at 187. Such a result not only invites defense malfeasance, but consumes large quantities of time and guarantees nothing in the way of certainty. *Id.*, 107 S. Ct. at 1708, 95 L. Ed. 2d at 187.

Finally, although it might be suggested that the simple remedy to the *Bruton* problem is to forego joint trials when the confession of one defendant might conceivably incriminate the other, the efficacy of that remedy is questionable. *Id.*, 107 S. Ct. at 1708, 95 L. Ed. 2d at 187. Not only do joint trials serve an important function in our criminal justice system in terms of efficiency, they protect defendants from the unfair advantage that a later-tried defendant has over his earlier-tried counterpart, and avoid the criticism associated with inconsistent verdicts.[13] *Id.*, 107 S. Ct. at 1708-09, 95 L. Ed. 2d at 187.

In the end, the Court declined to extend *Bruton's* reach, concluding that "the calculus changes when confessions that do not name the defendant are at issue." *Id.* at 211, 107 S. Ct. at 1709,

[13] The Court also acknowledged that *Bruton* could be complied with by not using codefendant confessions at all, but rejected that suggestion, noting that "confessions `are . . . essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *Richardson v. Marsh*, 481 U.S. 200, 210, 107 S. Ct. 1702, 1708, 95 L. Ed. 2d 176, 187-88 (1987)(quoting *Moran v. Burbine*, 475 U.S. 412, 426, 106 S. Ct. 1135, 1143, 89 L. Ed. 2d 410, 424 (1986)).

95 L. Ed. 2d at 188. Having said that, however, the Court specifically reserved the issue of "the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at 211 n.5, 107 S. Ct. at 1709 n.5, 95 L.2d Ed. at 188 n.5. This, of course, is the issue presently before us.

IV.

There exits a substantial split of authority on the proper approach to the question expressly left open in *Marsh*. Some courts subscribe to the "contextual" or "evidentiary linkage" approach to the *Bruton* problem. Those jurisdictions principally rely upon the notion that when a nontestifying codefendant's confession tends to inculpate a defendant in light of other evidence presented, or to be presented, at trial, thereby creating a "substantial risk" that the jury will improperly use the confession, the defendant's Sixth Amendment confrontation right is denied. *See, e.g., United States v. Van Hemelryck*, 945 F.2d 1493, 1502-03 (11th Cir. 1991); *United States v. Pendegraph*, 791 F.2d 1462, 1465-66 (11th Cir. 1986); *People v. Fletcher*, 13 Cal. 4th 451, 456, 917 P.2d 187, 189 (1996); *Smith v. United States*, 561 A.2d 468, 474 (D.C. 1989); *People v. Cruz*, 121 Ill.2d 321, 330-31, 521 N.E.2d 18, 22-23 (1988); *People v. Kahn*, 200 A.D. 129, 136-37, 613 N.Y.S.2d 198, 203-04 (1994); *State v. Johnson*, 71 N.C. App. 90, 92, 321 S.E.2d 510, 513 (1984).

Other jurisdictions, however, employ the "facial implication" doctrine, holding that when the complaining defendant's name is

replaced with a neutral pronoun, and the confession does not otherwise, by itself, inculpate that defendant, it is admissible against the confessing codefendant. *See, e.g., United States v. Hoac*, 990 F.2d 1099, 1105 (9th Cir. 1993); *United States v. Williams*, 936 F.2d 698, 700 (2d Cir. 1991); *United States v. Strickland*, 935 F.2d 822, 825-26 (7th Cir. 1991); *United States v. Donohue*, 948 F.2d 438, 444 (8th Cir. 1991); *United States v. Vogt*, 910 F.2d 1184, 1192; (4th Cir. 1990); *United States v. Espinoza-Seanez*, 862 F.2d 526, 535 (5th Cir. 1988); *United States v. Gonzales*, 749 F.2d 1329, 1334 (9th Cir. 1984); *United States v. Belle*, 593 F.2d 487, 493 (3d Cir. 1979); *Hodges v. Rose*, 570 F.2d 643, 646-47 (6th Cir. 1978); *United States v. Dady*, 536 F.2d 675, 677-78 (6th Cir. 1976); *Harris v. State*, 218 Ga. App. 472, 473, 462 S.E.2d 425, 427 (1995); *State v. Craney*, 662 A.2d 899, 903 (Me. 1995); *Commonwealth v. Sanford*, 323 Pa. Super 436, 439-40, 470 A.2d 998, 999-1000 (1984).

At their extremes, neither approach is completely satisfactory. Evidentiary linkage, applied in its most liberal form, completely undermines the long held, and vitally necessary, presumption that juries follow trial court instructions. The approach also has practical administrative difficulties and may harm defendants as much as it may protect them.

Similarly, while the facial implication doctrine has simplistic appeal, redacted confessions with "neutral pronouns may still prove impossible to 'thrust out of mind.'" *People v. Fletcher*, 13 Cal. 4th at 463, 917 P.2d at 195 (quoting *Marsh*, 481

U.S. at 208, 107 S. Ct. at 1707-08, 95 L. Ed. 2d at 186). The possibility certainly exists whereby notwithstanding the substitution of a defendant's name with a neutral pronoun, a jury could reach but one conclusion ▓ that the omission is, in fact, the nonconfessing codefendant.[14] Although one might argue that is so only when linked with other evidence admitted at trial, the inferential step that the jury must take to reach that conclusion may be so small as to be no step at all. In those instances, the act of redaction becomes a mere formalistic exercise devoid of the Constitutional protections undergirding *Bruton*, and the confession's exclusion from evidence is warranted.[15] *See Clark v. Maggio*, 737 F.2d 471, 476 (5th Cir. 1984)(redaction technique must be employed cautiously and carefully to avoid violating the spirit, if not the letter, of *Bruton*).

Despite the State's assertions to the contrary, it does not necessarily follow from *Bruton* or *Marsh* that a confession that does not implicate a nonconfessing codefendant by name, automatically, and without further inquiry, passes Constitutional muster. We reject, in its most pristine form, the facial implication doctrine

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[14] *See, e.g., Harrington v. California*, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969) wherein four defendants, one Caucasian and three African-Americans, where tried together. Harrington, the Caucasian, had made statements placing himself at the scene of the crime. The confession of a nontestifying codefendant was introduced against that codefendant. Although the confession did not implicate Harrington by name, it did refer to "the white guy." Under the circumstances, the Court concluded the inculpatory effect was the same as if it had. *See also United States v. Foree*, 43 F.3d 1572, 1578 n.9 (11th Cir. 1995)(jury compelled by other evidence to conclude that defendant was person named in nontestifying codefendant's confession); *People v. Terry*, 2 Cal. 3d 362, 387-88, 466 P.2d 961, 976-77 (1970).

[15] The other option is to grant a severance and try the nonconfessing defendant separately if the state otherwise chooses to introduce the facially incriminating confession against the confessing defendant.

urged by the State.

We think the better approach is that typified by the holding in *United States v. Pendegraph*, *supra*, where the United States Court of Appeals for the District of Columbia Circuit held that "a redacted confession may still violate the *Bruton* rule if the statement *compels* a directly inculpating inference" between the redacted confession and the nonconfessing codefendant. 791 F.2d at 1465 (emphasis added) (where the word "individual" was substituted for Pendegraph's name in his codefendant's confession, the jury could infer that Pendegraph was that "individual" if only because there was no other possibility); *see also United States v. Washington*, 952 F.2d 1402, 1407 (D.C. Cir. 1991)(with proper limiting instruction, Confrontation Clause not violated by redacted statement that, when viewed with other evidence, does not create an inevitable association with the nonconfessing defendant).

As we see it, this approach accords with the rationale of *Bruton* as explained and limited by *Marsh*. The substantial risk to which *Bruton* speaks comes not from the incriminatory tendency of a nontestifying codefendant's confession as to another defendant, but from the belief that in certain exceptional circumstances, a jury will not be able to resist the temptation to ignore the trial court's instructions to overlook what has been thrust into their line of sight. Indeed, jurors are strongly presumed to follow trial court instructions. *See* n.6, *supra*. When however, the directly (and undeniably) inculpatory statements of a codefendant are given to the jury's consideration, notwithstanding a limiting

instruction to the contrary, the presumption is overcome and a substantial risk therefore exists that the jury will use the confession as evidence against the nonconfessing defendant. *Bruton*, 391 U.S. at 136-37, 107 S. Ct. at 1628, 20 L.Ed.2d at 485. In other words, a *Bruton* violation occurs when jurors are compelled to do, as rational human beings, that which they have been instructed by the trial court they must not link a nonconfessing defendant to a nontestifying codefendant's confession. The compulsion to make the impermissible inference must be compelling, inevitable, and subject to little or no debate. Otherwise, the general and strong presumption that jurors follow their instructions is not overcome, and the requirements of *Bruton* are therefore satisfied. *See Marsh*, 481 U.S. at 211, 107 S. Ct. at 1709, 176 L. Ed. 2d at 188.

To be sure, some courts have predicated their conclusions that a confession creates a "substantial risk" that the jury will not heed trial court instructions and therefore is "powerfully incriminating" to a defendant based upon the relative strength of the state's case. *See, e.g., United States v. Key*, 725 F.2d 1123, 1126 (7th Cir. 1984); *English v. United States*, 620 F.2d 150, 152 (7th Cir. 1980). That analysis, however, concerns whether the denial of a defendant's confrontation rights was harmless, *see, e.g., Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 705 (1967), not whether the denial of those rights occurred in the first place. We agree that

> "[t]he decision on how to `*Brutonize*' a statement, if necessary, must ordinarily be

> made early in the trial, when the judge is not in an ideal position to assess the strength of the government's case. A judge can decide at the outset, however, whether a codefendant statement is likely to incriminate other defendants in such a way as to create a substantial *risk* that the jury will consider it in deciding on the guilt of those defendants. If the incriminating references ultimately adds little to the government's case, then their exclusion does no harm, and the confrontation rights of the defendants are preserved. We do not read *Bruton* as guaranteeing a right of confrontation only as against testimony that proves to be vital to the prosecution's case.

Hodges v. Rose, supra, 570 F.2d at 647 n.9. It was in this manner that the trial judge in the case *sub judice* ordered the redaction of Bell's confession, but otherwise allowed the State the benefit of its evidentiary value.

V.

As indicated in Part I., *supra*, the State substituted the words "deletion" or "deleted, for the names of Gray and Vanlandingham. Bell's redacted confession, read to the jury and introduced into evidence, provided in pertinent part:

> "Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?
>
> Answer, an argument broke out between *deletion* and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran into Wildwood Parkway. Me, *deleted*, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.
>
> Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?

Answer, hit, kicked.

Question, who hit and kicked Stacey?

Answer, I hit Stacey. He was kicked, but I don't know who kicked him.

Question, who was in the group that beat Stacey?

Answer, me, *deleted*, *deleted*, and a few other guys.

Question, did anyone pick Stacey up and drop him to the ground?

Answer, no, when I was there.

Question, what was the argument over between Stacey and *deleted*?

Answer, some money that Stacey owed *deleted*.

Question, how many guys were hitting on Stacey?

Answer, about six guys.

Question, do you have a black jacket with Park Heights written on the back?

Answer, yes.

Question, who else has these jackets?

Answer, *deletion*."

Prior to the confession's introduction into evidence, the court cautioned the jury that

> "the statement provided by Mr. Bell is to be considered by you as evidence against Mr. Bell only and in no way is Mr. Bell's statement provided to the detective about which he's about to testify to be considered as evidence against Mr. Gray. It is evidence against Mr. Bell only, and, as I will instruct you later, you will consider the evidence against the defendants individually and reach a separate verdict as to each defendant."

Taking its cue from the District of Columbia Court of Appeals, the intermediate appellate court relied heavily upon *Smith v. United States*, 561 A.2d 468 (D.C. 1989) wherein blank spaces were used in place of Smith's name in his co-defendant's inculpatory, but otherwise redacted, confession. The Court of Appeals for the District of Columbia opined that:

> "In order to determine whether a substantial risk exists [that the jury will improperly use the confession against the non-confessing codefendant], `the trial court must consider the degree of inference the jury must make to connect the defendant to the statement and the degree of risk that the jury will make that linkage despite a limiting instruction.' The trial court's assessment as to whether the redaction effectively avoids linkage with the defendant must be make in the context of other evidence admitted at trial."

Smith, 561 A.2d at 474 (quoting *Foster v. United States*, 548 A.2d 1370, 1379 (D.C. 1988)). Applying that standard, the Court of Special Appeals noted that "mere deletion of [Gray and Vanlandingham's names]" failed to eliminate from Bell's confession *Bruton* hazards because the jury "did not have to make a substantial inference that [Gray] was [one of] the person[s] neutrally referenced in the redacted statement." *Gray*, 107 Md. App. at 327, 667 A.2d at 990. In other words, in light of other evidence presented at Gray's trial, "the jury could reasonably infer that it was appellant whose name had been `deleted.'" 107 Md. App. at 328, 667 A.2d at 991.

While we agree that the jury *could have* reasonably inferred that one of the deleted names belonged to Gray, that inference was not compelled. As both the trial court and the intermediate

appellate court acknowledged, as many as six individuals participated in the attack on Williams. The Court of Special Appeals, however, pointed out that "only three were positively identified [redacted] Bell, appellant, and [Vanlandingham]" and concluded that "[Gray]'s role was clearly demonstrated by Bell's confession, rendering it facially incriminating[.]" 107 Md. App. at 327, 667 A.2d at 990. We disagree.

As we have said, a *Bruton* violation occurs when a codefendant's confession, either facially, or by compelling and inevitable inference, inculpates a nonconfessing defendant. Under those circumstances, there *is* a substantial risk that the jury will not heed the trial court's instructions to disregard the confession as evidence against the nonconfessing defendant or defendants.

True, Shay Yarberough implicated the same individuals from the witness stand as did Bell's confession, but Yarberough also testified that at least three other individuals were involved in the fray, whom he could not (or would not) identify. Other than by inference, the jury had no way of knowing that Yarberough's testimony and Bell's confession paralleled, and the prosecution did not, in any way, suggest such a coincidence.[16] It was that very inference that the trial court instructed the jury that they must not make.

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[16] Although there is no evidence or allegation of misconduct in this case, the *Marsh* Court alluded to the possibility that prosecutorial attempts to undermine a trial court's limiting instruction by encouraging jurors to make impermissible inferences regarding the relationship between a defendant and a nontestifying codefendant's confession may form the basis of a *Bruton* challenge. 481 U.S. at 211, 107 S. Ct. at 1709, 95 L. Ed. 2d at 188. At least two courts have provided relief upon this basis. *See United States v. Sherlock*, 865 F.2d 1069 (9th Cir. 1989); *People v. Cruz*, 521 N.E.2d 18, cert. denied, 488 U.S. 869, 109 S. Ct. 177, 107 L. Ed. 2d 146 (1988).

As we indicated, *supra*, that the jury could have reasonably connected Gray to Bell's confession is not sufficient to raise a *Bruton* challenge. Although the jury knew at the time of trial Vanlandingham was dead, the omitted references in Bell's confession could have been any one of at least four other individuals ▓ a fact emphasized by the States' Attorney no less than three times during her final summation. The jury was instructed not to use Bell's confession as evidence against Gray, and, in light of the strong presumption that the jury followed those instructions, Gray's Sixth Amendment confrontation right was adequately protected. His unsupported speculation about what the jury might have done if they drew an impermissible inference is simply insufficient to warrant a reversal upon these facts. In short, "there does not exist [in the present case] the overwhelming probability of [the jury's inability to follow trial court instructions] that is the foundation of the *Bruton*[] . . . Rule." *Marsh*, 481 U.S. at 208, 107 S. Ct. at 1707, 95 L. Ed. 2d at 185.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED; CASE REMANDED TO THAT COURT WITH DIRECTIONS TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY RESPONDENT.

IN THE COURT OF APPEALS OF MARYLAND

No. 15

September Term, 1996

STATE OF MARYLAND

v.

KEVIN D. GRAY

Bell, C.J.,
Eldridge
Rodowsky
Chasanow
Karwacki
Raker
Murphy, Robert C.,
(Retired, specially assigned),
JJ.

Dissenting Opinion by Bell, C.J.,
and Eldridge, J.

Filed: January 15, 1997

Bell, C.J., and Eldridge, J., dissenting:

We would affirm the judgment of the Court of Special Appeals for the reasons set forth in Judge Cathell's excellent opinion for that court. *See Gray v. State*, 107 Md. App. 311, 667 A.2d 983 (1995).

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 244

SEPTEMBER TERM, 1995

KEVIN D. GRAY

v.

STATE OF MARYLAND

Fischer,
Cathell,
Hollander,
JJ.

Opinion by Cathell, J.

Filed: December 4, 1995

Appellant, Kevin D. Gray, was convicted by a jury in the Circuit Court for Baltimore City of involuntary manslaughter. The court committed appellant to the custody of the Commissioner of Correction for a period of ten years, with all but seven years suspended. Appellant presents two issues for our review, which we rephrase as follows:

> 1. Did the trial court err in admitting into evidence the redacted statement of appellant's codefendant that implicated appellant in the crime?
>
> 2. Did the trial court abuse its discretion when it substituted an alternate juror for a designated juror during trial?

After a review of the relevant facts and law regarding the first issue, we shall reverse appellant's conviction and remand to the trial court. We do not reach appellant's second issue.

Six young men were involved in the beating death of Stacey Williams on November 10, 1993. Investigation of the incident prompted the authorities to arrest Anthony Bell, who gave a written statement implicating himself, appellant, and Jacquin Vanlandingham (also known as "Tank") in Williams's death.[1] These three individuals were the only ones identified by name as having been involved in the beating.

Appellant and Bell were scheduled to be tried jointly. Prior to trial, appellant moved to sever his case from Bell's, or, in the alternative, to exclude Bell's statement from their joint trial.

[1] Tank was fatally shot two days after the incident.

The court denied appellant's motion to sever and ordered that appellant's and Tank's names be redacted from Bell's statement. Bell declined to testify.

At trial, Tracey Brumfield placed appellant at the scene of the crime. She testified that she saw appellant, Tank, and several others chase Williams down the street. Shay Yarberough actually witnessed the beating. He testified that he saw Tank kick and punch Williams several times and pick Williams up over his head and throw him head first onto the sidewalk three times. He also testified that he saw appellant attempt to pick Williams up over his head and drop him on the sidewalk. Detective Homer Pennington of the Baltimore City Homicide Unit testified that he was assigned to the case and, in the course of his investigation, interviewed Bell. During the interview, Bell gave a written statement implicating himself, appellant, and Tank in Williams's beating. The State was permitted to read the statement into evidence at trial, but, as previously stated, was required to redact the names of appellant and Tank therefrom; the words "deletion" and "deleted" were inserted in place of the redacted names. A copy of the statement was also introduced into evidence and blank white spaces marked the places where the names of appellant and Tank had been redacted. We shall address the actual reading of the statement before the jury, *infra*.

Appellant testified in his defense. He stated that he was talking to his girlfriend on a nearby pay phone at the time of the beating. Several other witnesses were called in appellant's

defense. Renardo Bell testified that he saw Tank pick up Williams and throw him down, but he did not see appellant in the group. Lamont Matthews also testified that appellant was not in the group of people that had gathered around and beat Williams; that appellant was at a phone booth about half a block up the street. Chanel Brown, appellant's girlfriend, stated that appellant had called her from a pay phone and that appellant had said that Tank was up the street fighting. The jury found appellant guilty of involuntary manslaughter. He filed this timely appeal from that conviction.

Appellant seeks resolution of a question left unanswered by the United States Supreme Court in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968), and *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702 (1987): whether the introduction of a nontestifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using the words "deleted" and "deletion," and the reading of that statement before a jury, violates a defendant's rights under the Confrontation Clause of the Sixth Amendment, even if the jury is instructed to consider the statement only against the codefendant-confessor. We hold that, under the circumstances of this case, it does and reverse. We explain.

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 1068 (1965), guarantees

the right of an accused "to be confronted with the witnesses against him." The right of confrontation includes the right of cross-examination. Thus, "where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand." *Richardson*, 481 U.S. at 206, 107 S. Ct. at 1707.

In *Bruton, supra*, Bruton and Evans were charged with armed robbery. Both were convicted after a joint trial, at which a postal inspector, to whom Evans had confessed his involvement and Bruton's complicity, testified thereto. The trial court duly instructed the jury to disregard the confession in determining Bruton's guilt or innocence and to consider it as competent evidence only against Evans. The Supreme Court began its discussion by noting what had been the Court's premise up to that point: that "it [was] 'reasonably possible for the jury to follow' sufficiently clear instructions to disregard [a] confessor's extrajudicial statement that his codefendant participated with him in committing the crime." 391 U.S at 126, 88 S. Ct. at 1622 (quoting *United States v. Delli Paoli*, 352 U.S. 232, 239, 77 S. Ct. 294, 299 (1957)). The problem with adhering to this principle had earlier been indicated by the dissent in *Delli Paoli*. Justice Frankfurter spoke for the four dissenters:

> [T]oo often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors . . . and fails of its purpose as a legal protection to defendants against whom such a declaration

> should not tell. . . . The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.

352 U.S. at 247-48, 77 S. Ct. at 303.

While recognizing the efficacy of joint trials, the *Bruton* Court also acknowledged that the potential for abrogation of a defendant's constitutional right of confrontation was a "hazard" that could not be ignored. 391 U.S. at 137, 88 S. Ct. at 1628 (quoting *Jackson v. Denno*, 378 U.S. 368, 389, 84 S. Ct. 1774, 1787 (1964)). Though the Court suggested the possibility that "viable alternatives" existed to achieve both the benefit of admission of the statement and the protection of a nonconfessor's right of confrontation, it stated that, when a confessor does not take the stand at trial and his confession is introduced into evidence, there is a "substantial risk that the jury, despite instructions to the contrary[will] look[] to the incriminating extrajudicial statements" in determining the guilt or innocence of the nonconfessing codefendant, in violation of that defendant's Sixth Amendment right of cross-examination. *Id.* at 126, 88 S. Ct. at 1622; *see also Jackson*, 378 U.S. at 389, 84 S. Ct. at 1787. Limiting instructions were perceived by the Court as not being "an adequate substitute" for a codefendant's constitutional right of cross-examination: "The effect is the same as if there had been no instruction at all." 391 U.S. at 137; 88 S. Ct. at 1628. The *Bruton* Court then held, as we indicated, that, because of the "substantial

risk" that the jury would consider an incriminating confession against the confessor's codefendant despite limiting instructions, the confession cannot be admitted in evidence unless the codefendant has the opportunity to cross-examine the confessor.

As stated, *Bruton* acknowledged that which the *Delli Paoli* dissenters had broached, *i.e.*, the possibility that a jury may not follow a curative instruction to disregard a confession in determining the guilt or innocence of a confessor's codefendant. Indeed, in *Delli Paoli*, the Court had sanctioned the use of limiting instructions. It was not until *Bruton* that the Court fully acknowledged that it was not realistic to assume that juries would follow the instruction once privy to information implicitly or explicitly inculpating the confessor's codefendant. 391 U.S. at 126; 88 S. Ct. at 1622. One approach suggested by the Court, that had been in use in several states, was the practice of deleting, or redacting, any references to the codefendant from the statement being introduced.

This practice was challenged in *Richardson v. Marsh, supra*, where the Supreme Court declined to extend *Bruton* and upheld the practice whereby the codefendant's name, as well as her existence, were eliminated and a curative instruction was given at the time the statement was admitted and again when the jury was charged. Over her objection, Clarissa Marsh and one Benjamin Williams were jointly tried on charges of murder, robbery, and assault.[2] At

[2] A third suspect, Kareem Martin, was a fugitive at the time of the trial.

trial, the State successfully introduced a confession the police had elicited from Williams following his arrest. It had been redacted to omit any reference to Marsh — in fact, as read into evidence, it appeared that no one other than Williams and Martin had participated in the crime.[3] At the time that the redacted

[3] Williams's redacted confession in its entirety read:

> "On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. He said he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes later Kareem came by in his black Monte Carlo car. I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbers house. Kareem said there would be over $5,000 or $10,000 in the place. Kareem said he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled [sic] .22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I would wait in the car in front of the house and then I would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside. A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this older lady were in the dining room, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two people on the floor. After Kareem took the lady upstairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before
> (continued...)

confession was admitted, the court instructed the jury not to consider it in any way against Marsh. With the confession redacted, the only evidence that linked Marsh to the crime was: 1) Marsh's own testimony, in which she admitted that she was in the car with Williams and Martin while driving to the victims' house, and 2) Williams's confession that, while driving to the victims' house, he and Martin discussed their intent to rob and kill the victims. Marsh alleged that *Bruton* was dispositive of her claims; that introduction of Williams's confession violated her constitutional rights under the Confrontation Clause. The Court held that the admission of Williams's confession with the proper limiting

[3](...continued)

> we ever got upstairs. Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I came downstairs and then Kareem came down with the lady. I said, 'Let's go, let's go.' Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple of minutes later Kareem came to the car and said he thinks the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, get my share of the robbery after he had counted the money. That's all."

Richardson v. Marsh, 481 U.S. 200, 205 n.1, 107 S. Ct. 1702, 1705 n.1 (1987).

instruction had not impinged upon Marsh's right of confrontation because the confession did not name her as a perpetrator of the crime or indicate that she was in any way involved in it. *Richardson*, 481 U.S. at 211, 107 S. Ct. at 1709. Rather, it was her own testimony, placing her in the same car with Williams and Martin while they discussed their intent to rob and kill the victims, that tied her to the crimes.

The Court explained that, in *Bruton*, it had recognized a "narrow exception" to the general assumption that jurors follow the instructions given to them. Where a confessing codefendant does not take the stand, the Court opined, "the risk that the jury will not . . . follow instructions is so great, and the consequences of failure so vital to the [nonconfessing] defendant" that it would not presume that jurors, under those circumstances, would follow instructions. 481 U.S. at 207, 107 S. Ct. at 1707 (quoting *Bruton*, 391 U.S. at 135, 88 S. Ct. at 1627)). Under the facts presented in *Richardson*, where the references to Marsh were redacted, Williams's confession was only inferentially incriminating — that is, incriminating only when linked with other evidence adduced at trial. In such a circumstance, "the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget." *Id.* at 208, 107 S. Ct. at 1708. The same cannot be said for confessions that specifically reference a codefendant's complicity in the perpetration of the crime, such as that evinced in *Bruton*.

There, Evans's confession directly implicated Bruton as a perpetrator. It was precisely this type of confession that prompted the Court to carve out its exception: "Specific testimony that 'the defendant helped me commit the crime' is more vivid than inferential incrimination, and hence more difficult to thrust out of mind," the Court opined. 481 U.S. at 208, 107 S. Ct. at 1708. There did not, in *Richardson*, "exist the overwhelming probability of the[jurors'] inability to [disregard the incriminating inference] that is the foundation of Bruton's exception to the general rule."[4] *Id.*

While holding that Marsh had been accorded her constitutional rights, the Court stated, however, that it expressed "no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Richardson*, 481 U.S. at 211 n.5, 107 S. Ct. at 1709 n.5. Indeed, neither the Supreme Court nor any Maryland appellate court has ever addressed the constitutional ramifications of replacing a defendant's name with a symbol or neutral word in an incriminating statement made by a codefendant.

Surveying other jurisdictions that have faced this issue, we find persuasive the reasoning and analysis employed by the D.C.

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[4] The Court then went on to detail the problems inherent in applying the *Bruton* exception to only inferentially inculpatory evidence: "If extended to confessions incriminating by connection, not only is [compliance with *Bruton* by redaction] not possible, but it is not even possible to predict the admissibility of a confession in advance of trial." *Richardson*, 481 U.S. at 209, 107 S. Ct. at 1708.

Court of Appeals in *Smith v. United States*, 561 A.2d 468 (1989), wherein a symbol was used in the place of Smith's name in his codefendant's redacted statement to police. There, Smith and one Harris were tried together on a number of robbery charges. Harris had confessed prior to trial and named Smith as his accomplice. Prior to its admission, Harris's confession was redacted "by 'whiting out' all references to Smith and then penciling a rectangular boundary around each remaining blank space." 561 A.2d at 473. Fourteen such rectangular symbols appeared on Harris's two-page confession. In reviewing its impact upon Smith's Sixth Amendment rights, the D.C. Court of Appeals said:

> [A] properly and effectively redacted statement substituting neutral references for names (including nicknames and the like) and/or descriptions . . . may be admitted into evidence at a joint trial (when coupled with proper limiting instructions) unless a 'substantial risk' exists that the jury will consider that statement in deciding the guilt of the defendant. *In order to determine whether a substantial risk exists, the trial court must consider the degree of inference the jury must make to connect the defendant to the statement and the degree of risk that the jury will make that linkage despite a limiting instruction*. The trial court's assessment as to whether the redaction effectively avoids linkage with the defendant must be made in the context of other evidence admitted at trial.[5]

Id. at 474 (emphasis added; citations and quotations omitted; omission in original). The court then held that, in light of the other evidence adduced at trial, there was a substantial risk that

[5] This approach is known as the contextual analysis of *Bruton* questions.

the jury had relied on Harris's confession in determining Smith's guilt; the jury was "virtually invited . . . to use Smith's name to 'fill in the blanks.'" *Id.*

In the case *sub judice*, in moving the trial court to sever appellant's trial from Bell's, appellant's defense counsel argued:

> Mr. Bell's statement, in its totality and in various parts, clearly is indicating a group activity in the beating death of Mr. Stacey Williams.
>
> Therefore, it can only be inferred when these two gentlemen are sitting at the same defense table, that when [Bell] was implicating . . . himself, that he . . . must have implicated Mr. Gray.
>
> Because we have no right to cross examine Mr. Bell as to his statement, Your Honor, I believe that the entire statement must be excluded, or in the alternative a severance must be granted. I think *Bruton* makes it clear that the reason for the red line type rule announced in *Bruton* was because of the fact that [appellant] would be denied his right to confrontation, and it would be a logical inference drawn by a jury that if one client made a statement concerning a group activity and two people are on trial for that group activity, by implication the statement goes to the detriment of Mr. Gray . . . .

The trial court denied the motion:

> It seems to me . . . that there is not a difficulty here with a statement which involves two people where we redact the name of the defendant who is making the motion, that there's going to be this compelling implication to the jury that the name that's been redacted or left out must be the name of the co-defendant.
>
> To the contrary, I think that where you've got group activity and the evidence here is, apparently, going to be that there were at least five, and maybe as many as six

men involved in this assault on the victim, to redact this statement, it seems to me, will not unduly prejudice Mr. Gray.

It seems to me that this statement can be sanitized in about three different spots so as to remove the names of Tank and Mr. Gray and the jury will not be left with the unavoidable inference or implication that the person Mr. Bell is referring to in the statement is Mr. Gray.

. . . .

. . . I just don't see any prejudice befalling Mr. Gray if we can adequately sanitize this statement and take out any indication from Mr. Bell contained in this statement of the identity of anybody else who was involved in the assault. Not just Mr. Gray's name, but we're going to take out all of the names because the evidence is going to be that there were six people involved, and, therefore, to take out all of the names, that will not hurt Mr. Gray, it seems to me.

[APPELLANT'S ATTORNEY]: Well, Your Honor, the jury only has one other person to choose from because there are not five or six people on trial.

THE COURT: Oh, no. Well, I'll instruct the jury that the involvement or alleged involvement, or if the evidence seems to suggest that others are involved, obviously, they're not to consider that the others involved are not on trial. They should not speculate as to why others said to have been involved are not on trial. They are to consider only the evidence against each of the defendants in reaching their verdicts, and, of course, I would instruct the jury that they are not to consider Mr. Bell's statement as evidence against Mr. Gray . . . . But I think that the redaction of the statement together with the instructions will avoid any prejudice to Mr. Gray.

[APPELLANT'S ATTORNEY]: The whole proposition of *Bruton* is that such a limiting in-

struction will not work in this type of situation.

THE COURT: . . . I made this ruling, of course. In addition to the fact that, according to the State's proffer, there will be eyewitness identification of both defendants as among the six who committed the deadly assault on Mr. Williams.

[APPELLANT'S ATTORNEY]: Yes, but if the witnesses, if they do identify Mr. Bell and Mr. Gray as being among those six individuals, and then add to that a statement where Mr. Bell states that he was involved in the beating —

THE COURT: It makes the case against Mr. Bell simply stronger than Mr. Gray.

[APPELLANT'S ATTORNEY]: And it makes the case against Mr. Gray stronger.

THE COURT: I don't think so. I don't think so.

[APPELLANT'S ATTORNEY]: Because two people are named, one of them admits, oh, yes, I was involved, that clearly makes the evidence of that one witness appear more believable, and that witness is stating that two people were recognized.

THE COURT: I understand your position. Your motion for severance is denied.

Detective Pennington read Bell's redacted statement to the jury. In pertinent part, that which was read included:[6]

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[6] Prior to the statement being read into evidence, the court admonished the jury that the statement

> is to be considered . . . as evidence against Mr. Bell only and in no way is . . . [it] to be considered . . . as evidence against Mr. Gray. It is evidence against Mr. Bell only, and . . . you will consider the evidence against each of the defendants individually and reach a separate verdict as to each defendant.

Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?

Answer, an argument broke out between *deletion* and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran onto Wildwood Parkway. Me, *deleted*, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.

Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?

Answer, hit, kicked.

Question, who hit and kicked Stacey?

Answer, I hit Stacey. He was kicked, but I don't know who kicked him.

Question, who was in the group that beat Stacey?

Answer, me, *deleted*, *deleted*, and a few other guys.

Question, do you know the other guy's name?

Answer, *deleted*, *deleted*, and me. I don't remember who was out there.

Question, did anyone pick Stacey up and drop him to the ground?

Answer, no, when I was there.

Question, what was the argument over between Stacey and *deleted*?

Answer, some money that Stacey owed *deleted*.

Question, how many guys were hitting on Stacey?

Answer, about six guys.

Question, do you have a black jacket with Park Heights written on the back?

Answer, yea.

Question, who else has these jackets?

Answer, *deletion*.

Question, after reading this statement, would you sign it?

Answer, yes. He then signed it. [Emphasis added].

In reading the statement to the jury, where the written version indicated "deleted" and "deletion," Detective Pennington spoke the words "deleted" and "deletion."

Evidence otherwise directly implicating appellant in the commission of the crime came from two individuals — Tracey Brumfield and Shay Yarberough. Brumfield, a witness only to the chase, testified that appellant and Tank were among a group of twelve young men chasing Stacey Williams down the street, approximately ten to twelve feet behind him. She did not recognize the others in the group, getting only a four to five second glance at all of them as they passed approximately six feet in front of her. She admitted that she knew Tank and appellant were friends and were frequently seen together. She did not recognize Bell as one of the men chasing Williams. She stated that she then ran into Yarberough and that the two walked to the house of Williams's girlfriend. Yarberough testified that he witnessed Williams's beating from across the street and could only name Tank, appellant, and Bell as

among the six individuals involved in the fray. He then described how Tank and appellant hit Williams and dropped him on his head several times. Bell was also seen hitting Williams. On cross-examination, however, it was revealed that, among other inconsistencies, Yarberough had apparently provided a statement to the police different from his testimony at trial, in which he stated he saw the altercation but did not know the identities of those involved in it.

In determining whether Bell's statement was sufficiently redacted, the trial court had to assess *Bruton*'s "substantial risk" criterion in light of the degree of inference the jury would have had to make to connect appellant to Bell's statement and the degree of risk that the jury would have linked the two despite a limiting instruction. *See Smith*, 561 A.2d at 474.

Mere deletion of appellant's (and Tank's) name did not effectively make Bell's statement nonincriminating as to appellant. In the context of other evidence (Brumfield's and Yarberough's testimony), the jury need only have taken a short step in inferring that appellant was one of those involved. Stated otherwise, it did not have to make a substantial inference that appellant was the person neutrally referenced in the redacted statement. Therefore, there existed a "substantial risk" that the jury considered the statement in deciding appellant's guilt. Indeed, with Tank dead, the jury was "virtually invited . . . to use [appellant]'s name to 'fill in the blanks.'" *Id.* Simply stated, the use of "deleted" or "deletion" was insufficient to protect appellant against "the prac-

tical and human limitations of the jury system." *Bruton*, 391 U.S. at 135, 88 S. Ct. at 1627. *See also Greenwell v. United States*, 336 F.2d 962, 969 (D.C. Cir. 1964) (replacing name of defendant with neutral term such as "named person" insufficient redaction since "with other evidence . . . connecting the co-defendants in the commission of the crime, it is difficult to believe that the jury was unable to divine who the 'anonymous nobody' referred to in the confession was"), *cert. denied*, 380 U.S. 923, 85 S. Ct. 921 (1965). Although, as the State argues, there were six perpetrators, any one of which the jury could infer was referred to by the deletions, only three were positively identified — Bell, appellant, and Tank. Appellant's role was clearly demonstrated by Bell's statement, rendering it facially incriminating and constitutionally violative. "To hold that there was not a substantial risk that the[jury] would consider th[e] evidence . . . in considering [a codefendant]'s guilt (limiting instruction or not) would require us to wink at the reality of human behavior of jurors as recognized by the Court in both *Bruton* and *Richardson v. Marsh*." *Foster v. United States*, 548 A.2d 1370, 1379 (D.C. App. 1988).

Thus, the instant case represents a point on the continuum between *Bruton* and *Richardson* "where one cannot have the requisite degree of assurance that the jury will not improperly consider the evidence in deciding the guilt of the defendant against whom the evidence is not admissible despite a proper limiting instruction." *Foster*, 548 A.2d at 1378. We add further that we distinguish

Richardson v. Marsh by the manner of redaction employed. In *Richardson*, Marsh's role in the perpetration of the crime had been totally eliminated. There was no indication that anyone other than Williams and Martin committed the crime. In the instant case, however, appellant's role was disclosed, albeit with reference to a neutral person. Bell was not portrayed as solely having assaulted Williams and the jury could reasonably infer that it was appellant whose name had been "deleted."

Given our conclusion that there existed a violation of appellant's constitutional rights, we now subject that violation to further analysis to determine whether it was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 22-23, 87 S. Ct. 824, 826-27 (1967) (Not all constitutional errors mandate reversal). Maryland courts employ a harmless error analysis in addressing federal constitutional errors. See *Adam and Green v. State*, 14 Md. App. 135, 144 (1972), *Shedrick and Beckwith v. State*, 10 Md. App. 579, 585 (1970), and *Hamm, Lee, Bailey, and Cole v. State*, 7 Md. App. 474, 484 (1969) in the context of Sixth Amendment *Bruton*-type issues. As set forth in *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828, and restated in *Harrington v. California*, 395 U.S. 250, 254, 89 S. Ct. 1726, 1728 (1969), whether an error is harmless beyond a reasonable doubt "is to be based on an independent 'reading of the record and on what seems . . . to have been the probable impact . . . [of the tainted evidence] on the minds of an average jury.'" *Younie v. State*, 272 Md.

233, 246 (1974) (quoting *Harrington*, 395 U.S. at 254, 89 S. Ct. at 1728) (omissions and brackets in original). In other words, a constitutional error is not considered harmless if there is a reasonable possibility that improperly admitted evidence contributed to the conviction being challenged. *Schneble v. Florida*, 405 U.S. 427, 432, 92 S. Ct. 1056, 1060 (1972). Unless the State can prove that the defendant would undoubtedly have been found guilty in the absence of the allegedly tainted evidence, its use will always be error. *Younie*, 272 Md. at 246-47. If, on the other hand, the State can show beyond a reasonable doubt that the violation is technical or the evidence cumulative of other overwhelmingly inculpatory evidence, no error will be found. *Id.* at 247.

In *Harrington v. California, supra*, the Supreme Court granted *certiorari* to determine whether admission of the statements of Harrington's codefendants, in violation of *Bruton*, nonetheless was harmless beyond a reasonable doubt, as sanctioned in *Chapman v. California, supra*. In *Harrington*, four men were jointly tried on robbery and murder charges. The respective confessions of Harrington's three codefendants were introduced at trial, tempered by appropriate limiting instructions.[7] Harrington's own testimony, as well as that of the testifying confessor, placed Harrington at the scene of the crime. Though varying, accounts of his possession of a gun and the extent of his participation in the commission of the crime were

[7] One of the confessors took the stand and, thus, was subject to defense counsels' cross-examination.

elicited from other witnesses. The Court began by recognizing *Chapman*'s axioms that no federal constitutional error is harmless unless held to be harmless beyond a reasonable doubt and that not all constitutional errors call for reversal of a petitioner's conviction. 395 U.S. at 251-52, 89 S. Ct. at 1727. The Court concluded that, in that case, harmless error existed despite clear *Bruton* violations, even in spite of the cumulative nature of the nontestifying codefendants' confessions, "[b]ut apart from them," because the other evidence "was so overwhelming." *Id.* at 254, 89 S. Ct. at 1728. The Court further rejected the suggestion that, if the mind of one juror was tainted by the violative confessions, reversal was mandated. Its judgment, the Court opined, "must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average jury." *Id.*

In the case *sub judice*, we are not persuaded by the State's assertion that the testimony of Brumfield and Yarberough, in addition to that of the medical examiner,[1] were "substantial evidence" of appellant's guilt so as to render a *Bruton* violation, if any, harmless beyond a reasonable doubt. In view of the conflicting evidence of appellant's presence *vel non* at the scene, the jury may well have considered Bell's statement to have enabled

[1] The medical examiner testified that Williams died as a result of trauma to his head, such as caused by being struck on a hard surface.

the State to overcome its burden of proof beyond a reasonable doubt. If so, it may have resulted in appellant's conviction. Simply because other evidence tends to inculpate a defendant does not render the use of a codefendant's statement, admitted in violation of *Bruton*, harmless beyond a reasonable doubt. Indeed, the testimony of the witnesses on which the State relies may not have been compelling at all in the minds of the jurors. Brumfield was not herself a witness to the altercation that resulted in Williams's death and Yarberough's allegedly differing statements could have adversely affected his credibility. Bell's statement "might well have tipped the balance in the jurors' minds in favor of conviction." *Harrington*, 395 U.S. at 257, 89 S. Ct. at 1730 (Brennan, J., dissenting). We are unable to hold that the use of Bell's statement, which we have determined violated appellant's right to confrontation, did not result in appellant's conviction.

Thus, we hold that the statement was ineffectively redacted and its use at the joint trial deprived appellant of his right of confrontation. We further hold that it was not harmless beyond a reasonable doubt. Accordingly, we reverse and remand for a new trial.

JUDGMENT REVERSED; COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.